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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 DANIEL JOSEPH EGAN,

14 Defendant.
15

Case No. 2:07-CR-00145-KJD-PAL
2:09-cv-01899-KJD

ORDER

16
17 Before the Court is Defendant Daniel Joseph Egan's Amended Motion to Vacate Under 28
18 U.S.C. § 2255 (#1262). The Government has filed an opposition (#1400).

19 **I. Background**

20 In July, 2008, Defendant entered into a plea agreement and pled guilty to two counts of
21 violent crime in aid of racketeering under 18 U.S.C. § 1959(a)(3). Defendant had a leadership role in
22 the Aryan Warriors, a criminal gang. As a leader of this gang, Defendant ordered violent assaults on
23 two prison inmates. Based on his guilty plea, Defendant was sentenced to concurrent 200-month
24 prison sentences on September 19, 2008.

25 Defendant filed this amended motion for relief under 18 U.S.C. § 2255 on February 26, 2010.
26 The Government moved to dismiss the amended § 2255 motion, arguing that since Defendant

1 waived his right to appeal, the time to file ran from the day that judgment was entered. The Court
2 issued an order (#1393) denying the motion, and ordered the Government to file a response to the
3 amended § 2255 motion.

4 II. Discussion

5 A. Legal Standard

6 Claims asserting ineffective assistance of counsel are controlled by the familiar two-pronged
7 test defined in Strickland v. Washington, 466 U.S. 668 (1984). Under the first prong, the § 2255
8 defendant must demonstrate that counsel's conduct was constitutionally deficient in that it fell below
9 an objective standard of reasonableness. See Id. at 688. In evaluating counsel's performance, courts
10 must not engage in the distorting analysis of hindsight; rather, they must evaluate the reasonableness
11 of counsel's performance within the context of the circumstances at the time of the alleged errors.
12 See Id. at 690. Furthermore, because counsel's competence is presumed, to satisfy this prong, a
13 defendant must rebut this presumption by proving that his counsel's representation was unreasonable
14 under prevailing professional norms. See Kimmelman v. Morrison, 477 U.S. 365, 384 (1986). To
15 satisfy the second prong, the defendant must demonstrate that counsel's deficient performance
16 prejudiced him. See Strickland, 466 U.S. at 687. Typically, the defendant must show that there is a
17 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding
18 would have been different. See Id. at 694. The burden is undoubtedly on the defendant and unless
19 he proves both prongs, his claims fail. See Id. at 687.

20 The court need not conduct an evidentiary hearing where "the motions and the files and
21 records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b).
22 The court may take notice of affidavits filed in support of the motion and response when addressing
23 issues raised by a petitioner. See United States v. Hernandez-Mendoza, 1999 WL 1217933 at *5 (9th
24 Cir.1999)(upholding the denial of an evidentiary hearing on a § 2255 petition where "[t]he district
25 court reviewed the plea agreement, the plea petition, the transcript of the change of plea proceedings,
26 and the affidavits of [defense counsel] before denying the motion for an evidentiary hearing."). An

1 evidentiary hearing is only needed if “accepting the truth of [defendant’s] factual allegations, he
2 could have prevailed on an ineffective assistance claim.” United States v. Blaylock, 20 F .3d 1458,
3 1465 (9th Cir.1994).

4 B. Involuntary Guilty Plea

5 “Conviction as an aider and abettor requires proof the defendant willingly associated himself
6 with the venture and participated therein as something he wished to bring about.” United States v.
7 Zemek, 634 F.2d 1159, 1174 (9th Cir.1980). “[A]iding and abetting provides that a person who aids,
8 abets, counsels, commands, induces or procures the commission of an offense against the United
9 States is punishable as a principal.” United States v. Barnet, 667 F.2d 835, 841 (9th Cir. 1982)
10 (internal quotations omitted) (citing 18 U.S.C. § 2 (1976)). An abettor is one “who, with mens
11 rea, ... commands, counsels or otherwise encourages the perpetrator to commit the crime.” Id.
12 (quoting Perkins, Criminal Law, at 645 (2d ed. 1969)).

13 Defendant argues that his trial counsel was ineffective for failing to advise him that the facts
14 he admitted to do not constitute a violation of 18 U.S.C. § 1959(a)(3), the crime to which he pled
15 guilty. Defendant asserts that he is actually innocent of assault under 18 U.S.C. § 1959(a)(3) and that
16 he admitted only facts that would support a conviction for conspiracy under 18 U.S.C. § 1959(a)(6),
17 which carries a significantly lesser maximum sentence. Defendant further alleges that the Court’s
18 colloquy was defective since it did not explain the nature of the charges against him.

19 Defendant’s counsel was not ineffective because the facts admitted by Defendant do
20 constitute a violation of 18 U.S.C. § 1959(a)(3). Although Defendant never used the words “aiding
21 and abetting” the conduct he admitted to constitutes aiding and abetting. Specifically, when asked by
22 the Court if he “did something in relationship to Mr. Fetchman” Defendant admitted “Yes, Sir, I did.
23 I gave - the order and organized and sanctioned the assault on Mr. Fetchman.” (#1394 at 23:2-3.) He
24 also admitted to using his position in the Aryan Warriors to order the assault on the other inmate,
25 Cody Dunn. (Id. at 25-26.) By admitting that he gave these orders, Defendant has shown that he
26 willingly participated in the assaults and wished to bring them about, which constitutes aiding and

1 abetting. Defendant himself argues that he could be found guilty under (a)(3) only if he committed
2 an overt act. His admission that he gave the order supplies the overt act. See United States v.
3 DeGeorge, 380 F.3d 1203, 1216 (9th Cir. 2004) (perjury constitutes overt act in furtherance of
4 conspiracy). Accordingly, Defendant's admissions satisfy the elements of 18 U.S.C. § 1959(a)(3),
5 and his counsel was not ineffective for failing to advise him otherwise. Similarly, Defendant has no
6 ineffective assistance claim based on the Court's allegedly inadequate colloquy.

7 C. Maximum Sentence

8 Defendant contends that his counsel was ineffective for failing to object to the imposition of
9 the 200-month sentence because his admissions only establish a conviction under 18 U.S.C. §
10 1959(a)(6), which carries a statutory maximum sentence of three years. As stated *supra*, Defendant's
11 admissions satisfy the elements of 18 U.S.C. § 1959(a)(3), which carries a 20-year maximum
12 sentence. Accordingly, Defendant's counsel was not ineffective for failing to object to the 200
13 month sentence.

14 D. Sentencing Enhancements

15 1. Enhancement Under § 2A2.2(b)(4)

16 The Ninth Circuit has held that a "thing of value" is a term of art that encompasses intangible
17 benefits. United States v. Schwartz, 785 F.2d 673, 680 (9th Cir. 1986). Defendant admitted that he
18 acted in order to maintain and increase his status in the Aryan Warriors. Defendant cites inapposite
19 case law to claim that his counsel was ineffective for failing to argue that his status in the gang is not
20 a "thing of value." This argument fails because status in a criminal gang is an intangible benefit and
21 is sufficient to warrant the enhancement. His counsel was not ineffective for failing to argue
22 otherwise.

23 2. Double Counting

24 A court may apply two enhancements based on a single act when "it is necessary to ensure
25 that the defendant's sentence reflects 'the full extent of the wrongfulness of his conduct.'" United
26 States v. Archdale, 229 F.3d 861, 869 (9th Cir. 2000) (quoting United States v. Reese, 2 F.3d 870,

1 895 (9th Cir. 1993)). Impermissible double counting “occurs where one part of the Guidelines is
2 applied to increase a defendant’s punishment on account of a kind of harm that has already been fully
3 accounted for by the application of another part of the Guidelines.” Reese at 2 F.3d 895.

4 Defendant received a 4-level enhancement under § 2A2.2(b)(2)(B) for use of a deadly
5 weapon and the 6-level enhancement under § 2A2(b)(3)(C) because the victim received life
6 threatening injuries. Defendant argues that application of both these enhancements constitutes
7 impermissible double counting because “use of a weapon to inflict injury and the injury itself result in
8 the same harm from the same singular conduct.”

9 The guidelines recognize that use of a deadly weapon and infliction of life-threatening
10 injuries are distinct harms. Not every use of a deadly weapon results in life threatening injuries, and
11 not every life threatening injury is the result of the use of a deadly weapon. In order to impose a
12 sentence reflecting the full extent of Defendant’s wrongful conduct, the Court must count these
13 factors separately and apply enhancement for each. Accordingly, Defendant’s counsel was not
14 ineffective in failing to challenge these enhancements.

15 E. Notice of Appeal

16 Failure to file a notice of appeal upon a defendant’s request is ineffective assistance, even
17 where a defendant has waived his right to appeal. United States v. Sandoval-Lopez, 409 F.3d 1193,
18 1197 (9 Cir. 2005). In determining whether a defendant made such a request, an evidentiary hearing
19 is not required “where an issue of credibility can be conclusively decided on the basis of
20 documentary testimony and evidence in the record.” Watts v. United States, 841 F.2d 275, 277 (9th
21 Cir.1988); see also U.S. v. Beltran-Salas, 2007 WL 1302759 (D.Idaho, 2007) (unsupported and
22 conclusory claim to have requested an appeal is insufficient to warrant hearing).

23 Defendant claims that he asked his attorney to file an appeal of the 200-month sentence, but
24 was told that there was nothing to appeal. According to Defendant’s affidavit “Counsel never
25 informed me that he had an obligation to file a notice of appeal if I instructed him to do so.”
26 (emphasis added). Defendant’s use of male pronouns in his affidavit shows that this request was not

1 made to his trial counsel of record, Ms. Karen C. Winckler. Defendant is likely referring to Steven
2 Greenup, an attorney from the U.S. Freedom Foundation who was allegedly hired by Defendant for
3 purposes of an appeal, but never entered an appearance. (See Letter from Daniel Egan to the Clerk
4 of Court, May 11, 2012 Dkt. 1376). The Court is well aware of Defendant's confusion about Mr.
5 Greenup's representation because it became an issue when Defendant requested free transcripts from
6 the court reporter. Investigation by Court staff confirmed that, despite Defendant's belief, Mr.
7 Greenup never represented Defendant or filed anything in his behalf. Accordingly, any request made
8 to Mr. Greenup cannot for the basis of a claim for ineffective assistance of counsel.

9 Defendant's actual trial counsel, Ms. Winckler, has filed a detailed affidavit stating that she
10 has no recollection of Defendant asking her to file an appeal. She further avers that standard
11 procedure to file a notice of appeal when requested to do so, and that it is her standard practice to
12 make notes in the file if a client makes a request to file an appeal. Ms. Winckler states that there are
13 no such notes in the file. Ms. Winckler and the firm of Wright Stanish & Winckler are frequent
14 litigants in this district, and the Court is aware of the reputation for professionalism associated with
15 their practice. Based on Ms. Winckler's affidavit and the affidavit of Defendant, the Court can
16 determine without a hearing that Defendant never asked his trial counsel, Ms. Winckler, to file an
17 appeal. Accordingly, his claim for ineffective assistance of counsel on this ground fails.

18 Conclusion

19 **IT IS HEREBY ORDERED** that Defendant's Motion to Vacate (#1262) is **DENIED**.

20 **IT IS FURTHER ORDERED** that the Clerk of Court close case no: 2:09-cv-01899-KJD.

21 DATED this 28th day of September 2012.

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25 Kent J. Dawson
26 United States District Judge